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In the Supreme Court of the United States

October Term, 1962

No. [redacted] 37
CIVIL

GENE DURFEE AND LAURA DURFEE,
Petitioners,

vs.

JULIA E. DUKE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

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Cockle Printing Company—Law Briefs—Omaha, Nebr.

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ARGUMENT

Introduction

The parties hereto and amici curiae have presented their respective positions at some length. Further extensive argument would necessarily be repetitious and would add little, if anything, to what has previously been said. So far as the applicable law is concerned, we are content to rest our case on those principles and authorities that

we have previously reviewed. We do desire to call attention to a few matters in connection with the respondent's brief and to that filed by the State of Missouri. With this thought in mind, we present this very short reply brief.

Comments on Respondent's Brief

The respondent's principal brief adds nothing of substance to what was said in her brief resisting certiorari. The Court will note that the principal authority relied upon by the respondent is the opinion of the Court of Appeals. Thus, respondent's brief contains no less than twenty references to "Judge Blackmun" (referring, of course, to Honorable Harry A. Blackmun, the author of the opinion of the Court of Appeals herein) and six additional references to the "Blackmun Opinion". We respectfully submit that in this instance the Court of Appeals erred and that neither its reasoning nor its conclusion, though reiterated time and time again, can logically be sustained.

Strangely enough, respondent relies heavily upon *United States v. 171.74 acres of land, etc.*, D. C. Neb., 1962, 206 F. Supp. 322 (Affirmed in *Schroeder v. 171.74 acres of land more or less*, 1963, 318 F. 2d 311). That case merely applied the doctrine of *Treinies v. Sunshine Mining Co.*, 1939, 308 U. S. 66, 84 L. ed. 85, 60 S. Ct. 44, and held that the Nebraska court's determination on the question of subject matter jurisdiction in the former case was res judicata, despite that court's claimed error in failing to give full faith and credit to a prior Iowa judgment. See petitioners' principal brief, pages 35, 36. We respectfully submit that the Court of Appeals reached the correct result in the Schroeder case although its attempt to dis-

tinguish the decision now under review (which was relied upon by the appellants in Schroeder) does not appear to be sound. See 318 F. 2d at pages 315, 316.

On page 22 of respondent's brief it is asserted that notwithstanding the fact that the Court of Appeals held to the contrary, lack of the Nebraska Court's jurisdiction over the subject matter was clear, and the respondent relies upon the dictum in the memorandum opinion of Judge Duncan herein, that in his opinion the Nebraska Court incorrectly determined the fact issues concerning the location of the land in question. Petitioners' discussion of this issue is attacked by respondent on the ground that it "ridicules the proposition". Petitioners had no such intention. We do insist, however, that alleged lack of subject matter jurisdiction is not disclosed in this record and we reiterate, any lack of jurisdiction would necessarily be based upon an *independent determination* of fact that the Missouri River changed its course as a result of accretion instead of avulsion as determined in the Nebraska action.

On the top of page 25 of respondent's brief appears this paragraph:

> "If the Blackmun opinion is affirmed, this matter will go back to the District judge where it will be decided on its merits. If that judgment is not appealed it will be binding on both parties. If either party desires to appeal they can go directly to the Eighth Circuit and from there they will have an opportunity to return to this court."

May we respectfully suggest to respondent that she had the opportunity to seek review of this Court following the Nebraska Supreme Court's decision. That was the

time for Supreme Court review of the facts of the case if the Nebraska decision disclosed arbitrary or unreasonable action, an assumption of jurisdiction where none existed, or a taking of property without due process of law. The respondent, having failed to pursue her remedy in this regard, should not be permitted to escape the finality of the Nebraska Court's factual determination, obtain a contrary fact finding, and shift the burden to petitioners to "return to this Court". In other words what respondent now proposes as a remedy for the losing claimant if the facts are again examined by another tribunal is the very remedy respondent herself had after the decision of the Nebraska Supreme Court and did not choose to follow.

On page 27 of the respondent's brief, the Nebraska Court's decision is referred to as being "completely unfair". What we have said in the immediately preceding paragraph amply answers this contention. However, we would point out also that the plain fact is there is no question in this case involving the fairness of the Nebraska decisions. The questions presented for review herein are found on pages 3-5 of petitioners' brief and the respondent has disclosed no dissatisfaction with them as she could have done under Rule 40(3) of this Court, if she had been so inclined.

As previously stated, we do not deem it necessary to review again the authorities on which we rely. As to some of the cases cited previously by the parties, our construction of the decisions differs from the construction placed on them by respondent. It is for this court to determine which construction is warranted and we shall not burden the court with further argument in that regard.

Comments on Missouri's Brief

The brief amicus curiae, filed by the Attorney General of Missouri, and all eleven pages of it, is based upon an entirely false postulate, just as are many of the arguments advanced by respondent herein. The first two sentences of Missouri's brief serve, rather well, to disclose the entire position of the Attorney General of Missouri. Thus it is said:

> "The interest of the State of Missouri is in maintaining inviolate the exclusive authority and jurisdiction of the courts of Missouri to adjudicate title to Missouri land. Essentially, the question here involved is whether a judgment rendered by a Nebraska court can nullify, take away, or limit the exclusive power of the courts of Missouri to adjudicate title to Missouri land."

Thus Missouri's Attorney General takes the position that there is no question concerning the location of the land and he starts his brief, continues it, and finishes it, with that same false hypothesis. On occasions he seems to feel that there could be two titles to the land as between these private litigants, one a Missouri title and the other a Nebraska title. See, for example, bottom of page 2 and top of page 3 of Missouri's brief.

It scarcely needs to be said again that the very crux of this case was whether the land was located in Missouri or Nebraska and that depended solely on the fact question whether the Missouri River changed its course as a result of avulsion of accretion. It was determined in the Nebraska litigation that the change in course resulted from avulsion and that decision is binding between the parties to this suit.

On page 4 of the brief of the Attorney General of Missouri the statement is made that if in subsequent litigation between the states themselves, this Court should, by its determination of the boundaries between them, determine that the land is in truth in Missouri, Missouri would be compelled to recognize not the superior Missouri title but the Nebraska title founded upon a tax deed resulting from non-payment of Nebraska taxes on Missouri land. We do not know exactly what the Attorney General has in mind by this statement but it is clear that as respects Missouri tax laws or any other laws affecting the state itself, a determination by this Court of the boundary lines in an appropriate suit between the states would be conclusive. As far as the private litigants in this action are concerned the *title* to the land would not shift either way as a result of subsequent litigation (or for that matter compact) between Missouri and Nebraska.

At the top of page 5 of Missouri's brief it is again suggested that the Nebraska judgment could determine the Nebraska title and a subsequent Missouri judgment could determine the Missouri title to the land and thereby there would be no conflict. The Attorney General then suggests that if sometime in the future this Court determines the boundary it would then be determined which of the two judgments, that is Nebraska's judgment or Missouri's judgment is to be of value to the prevailing party. Such a suggestion merits slight discussion. In the parlance of the pavement it simply doesn't "make sense".

Again on pages 6 and 7, and in fact throughout Missouri's brief, the Attorney General speaks of Nebraska's title and Missouri's title and seems to feel that each state

has authority to adjudicate title to this land for "whatever that title may be worth" and that neither state should be required to give full faith and credit to the judgment of the other state adjudicating the title. This it would appear is a new concept in the law of titles. It is likewise a new concept in conflict of laws, res judicata, and full faith and credit.

The Attorney General of Missouri wholly fails to distinguish between states' rights and rights of private litigants within the states. It may well be that Missouri and Nebraska will one day settle their differences concerning boundary lines which may affect this land as well as hundreds of acres of other land similarly located along the border. Or it may be that eventually a suit will be brought by Missouri or Nebraska in this Court and this Court will make the determination of boundary. In neither event, however, will the title as between these private litigants, petitioners and respondent herein, be in the least affected. Title to this land has been established in the Durfees and that adjudication of title should not be disturbed.

On page 7 of Missouri's brief, it is suggested that the decision of the Supreme Court of Nebraska in effect purports to adjudicate the location of the boundary between the states. That simply is not true and we dare say that neither Nebraska nor Missouri would attempt to establish their boundary in a proceeding between private litigants who are each claiming title to land in dispute.

The Missouri Attorney General assumes that the Nebraska judgment purports to adjudicate a Missouri title. See *amicus curiae* brief of Missouri, page 11. Here again the Attorney General falls into the error of failure to

differentiate between private litigation between private individuals and litigation between sovereign states of the United States. Nebraska did not attempt to adjudicate Missouri title. The Nebraska Courts simply found that title to the land was in the Durfees and not in the respondent.

We would call attention to the fact that the position taken in Missouri's brief is in a sense flatly in conflict with that of the respondent whose contention the Attorney General seeks to sustain. Respondent contends that this litigation can be terminated promptly even if a decision is favorable to respondent. In other words, respondent argues that if this case is remanded to the Court of Appeals and to the District Court for a new trial, the District Court's decision would be res judicata. Missouri's Attorney General does not so contend. He merely says that there can be a Missouri title and a Nebraska title and that eventually it may be determined which title is of any benefit to the holder thereof. Under the theory of the Missouri Attorney General there would never be any finality to a judgment between these litigants until a subsequent action is brought between Nebraska and Missouri or until Nebraska and Missouri settle any boundary dispute they may have.

CONCLUSION

A few days following the oral argument herein, seven years will have elapsed since Gene and Laura Durfee filed their quiet title action in the District Court of Richardson County, Nebraska. Petitioners respectfully submit that the time is ripe for final adjudication of this controversy.

Counsel for respondent suggests that the rights of respondent as an individual and the rights of the Courts of Missouri to determine for themselves the location of the land in controversy is of far greater importance than termination of this litigation. We suggest that the rights of the petitioners are likewise to be considered and that they are entitled to be spared the expense of further protracted litigation.

The respondent has had her day in court and more. She is not entitled to further prolong this litigation. So far as Missouri is concerned, that state's rights are neither jeopardized nor in any way affected by this litigation. We dare say that both Nebraska and Missouri should welcome a decision that will give to the judgments of their highest courts the dignity and the full faith and credit to which they are entitled.

We respectfully submit that under the doctrines of res judicata and full faith and credit the judgment of the Court of Appeals is due for reversal and we renew the prayer of our principal brief.

Respectfully submitted,

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